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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GABE KAIMOWITZ,

Petitioner,

vs.

ORLANDO, FLORIDA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did opinions and orders below in the Eleventh Circuit conflict with a longstanding decision of this Court by their denial of any form of hearing or oral argument for an attorney in good standing to show how allegations of handcuffing and false arrest after his removal from a city council session related to a False Claims Act action he filed against Orlando, Florida, or to a damage action arising from similar municipal wrongdoing, in which he sought to intervene for himself and those similarly situated?

2. Did the Eleventh Circuit sanction such a departure of proceedings in the Orlando Division of the U.S. District Court for the Middle District of Florida, as to call for an exercise of the Supreme Court's power of supervision to assure meaningful access to the federal judicial system for a whistle-blower whose views admittedly are contrary to prevailing beliefs about a locale perceived perhaps worldwide as being comparatively free of institutional racism and corruption, because of name association with Disney World attractions?

PARTIES

This petition is on behalf of Gabe Kaimowitz, an attorney proceeding below in a False Claims Act action against Orlando, Florida. He later tried unsuccessfully to intervene in a damage action against that municipality. Only the municipality was a proper party in the relevant proceedings below in the U.S. Court of Appeals for the Eleventh Circuit.

However, in the False Claims Act action, Petitioner is pursuing an appeal on the merits from a grant of summary judgment, without oral argument or evidentiary hearing, for all defendants including Orlando City Planner Rick Bernhardt and Orlando Neighborhood Improvement Corporation ("ONIC") established in 1985. The United States Department of Justice duly considered but declined to intervene in the False Claims Act action, although its counsel monitored all pre-trial district court proceedings from March, 1994, to March, 1997.

In the damage action, Hal Noyes, a computer engineer, like Petitioner, was falsely arrested and detained by a city police officer while he was engaged in protected First Amendment activity. After Petitioner was denied intervention for injunctive and declaratory relief on behalf of all persons similarly situated, Mr. Noyes voluntarily withdrew his action with prejudice before any appearance was filed for the police officer Daniel Nessim or the municipality. Because of the foregoing, this petition is also is being served on counsel for ONIC, the U.S. Department of Justice, and Hal Noyes. Petitioner already has served all relevant papers on appeal in the damage action concerning Mr. Noyes and Mr. Nessim to Orlando's counsel in the False Claims Act action . That attorney will be served as counsel for Orlando, Florida, here.

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No. 97-

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GABE KAIMOWITZ,

Petitioner,

vs.

ORLANDO, FLORIDA,

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On Petition For A Writ Of Certiorari To The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Gabe Kaimowitz, respectfully prays that a writ of certiorari issue to review the judgments, opinions and orders of the United States Court of Appeals for the Eleventh Circuit entered on September 15 and November 20, 1997, in *Gabe Kaimowitz v. Orlando, FL*, and on February 6, 1998 and March 2, 1998, in *Hal Noyes v. Orlando, FL, Gabe Kaimowitz as Movant.*

CITATIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit in *Kaimowitz v. Orlando, Florida*, are published at 122 F.3d 41 (11th Cir. 1997), modified at 131 F.3d 950 (11th Cir. 1997). A lower court order was affirmed in the first opinion on Sept. 15, 1997. Modification was done on Nov. 20, 1997, with a denial of rehearing and denial of suggestion for hearing en banc. See placement herewith according to listing in the Table of Contents for the Appendix.

The orders and judgments of the United States Court of Appeals for the Eleventh Circuit, in *Hal Noyes v. Orlando, Florida* (*Gabe Kaimowitz as Movant or Petitioner*), are unreported. That is a case in the same court involving identical or closely related questions to *Kaimowitz v. Orlando, supra*. A petition for writ of mandamus, #97-2458 was dismissed as moot on Oct. 10, 1997; the appeal #97-2600 was dismissed by order of the court on Feb. 6, 1998, and rehearing or reinstatement of the appeal was denied on March 2, 1998. See placement herewith according to the listing in the Table of Contents for the Appendix.

The lower court orders, opinions and judgments in the United States District Court for the Middle District of Florida in both cases likewise are unreported. *Kaimowitz v. Orlando, supra*, was an appeal from a denial of preliminary injunction in a False Claims Act action, *United States ex rel Gabe Kaimowitz, qui tam, v. Orlando, et al.*, #95-204-Civ-Orl-19, (M.D. Fla. Orlando Division, Mar. 10, 1995) transferred from #94-284-Civ-J-10 (M.D. Fla. Jacksonville Division, Mar. 25, 1994). See placement of relevant orders, etc., herewith according to the listing in the Table of Contents for the Appendix. An appeal on the merits from summary judgment without hearing or oral argument has been docketed as #97-2777 in the United States Court of Appeals for the Eleventh

Circuit on Aug. 13, 1997 and briefing commenced. See placement herewith according to the listing in the Table of Contents for the Appendix. However, those issues are not ripe for this petition. *Hal Noyes v. Orlando, supra*, #97-254-Civ-Orl-22 (M.D. Fla. Orlando Division, 1997), was first brought to the attention of the United States Court of Appeals for the Eleventh Circuit by the petition for writ of mandamus.

From *Kaimowitz v. Orlando, supra*, chronologically are *Order* for Change of Venue, from the United States Court for the Middle District of Florida, Jacksonville Division, in *United States ex rel Gabe Kaimowitz, esq., Qui Tam, v. Orlando, Florida, et al*, 94-284-Civ-J-10, *supra*, Feb. 27, 1995, by Judge W. T. Hodges; *Order* for Denial of Recusal of Judges Resident in Orlando and the Senior Magistrate if Change of Venue is Allowed on Reconsideration, *United States ex rel Gabe Kaimowitz, esq., Qui Tam, v. Orlando, Florida, et al.*, 95-204-Civ-Orl-19, *supra*, March 15, 1995, by Judge Patricia C. Fawsett; *Order* of Denial of Reconsideration of Change of Venue, *id.*, March 16, 1995, by Judge Fawsett; *Order* of Denial of Rule 11 Sanctions, *id.*, June 15, 1995 by Judge Fawsett; *Order* of Denial of Filing of First Amended Complaint and for Preliminary Relief, *id.*, Jan. 29, 1996, by Judge Fawsett; *Order* of Denial of Unopposed Motion for Reconsideration of Recusal, *id.*, Aug. 23, 1996, by Judge Fawsett. Since preliminary relief was sought from a false arrest by Orlando of Gabe Kaimowitz, excerpts are included from an Oct. 31, 1995 Orlando Police Department Arrest Report submitted by Petitioner with his an Affidavit in the trial court in support of preliminary relief ; See also Docket Entry Excerpts, *United States ex rel Gabe Kaimowitz, esq., Qui Tam, v. Orlando, Florida, et al. supra*, from the Certificate of Readiness on Appeal, through Aug. 27, 1997, to reflect chronology of filings relevant to this petition from the Complaint, March 25, 1994.

See placement herewith according to the listing in the Table of Contents for the Appendix From *Hal Noyes v. Orlando, supra*, chronologically from the U.S. District Court, Middle District of Florida, Orlando Division, are an *Order* denying intervention and striking claim, Apr. 14, 1997, by Judge Anne C. Conway; Mr. Noyes' Notice of Voluntary Dismissal, *id.*, May 2, 1997, with *the Final Order of Dismissal, id.*, May 5, 1997, by Judge Conway.

See also *Order* granting recusal by Judge Conway because her impartiality could be questioned toward Gabe Kaimowitz in his only other appearance before her, in *Washington Shores Homeowners Association, et al., vs. City of Orlando*, #88-962-Civ-Orl-22 (M.D. Fla. 1988), on Sept. 27, 1993. See placement of aforementioned orders, etc., herewith according to the listing in the Table of Contents for the Appendix. See also therein Docket Record Excerpts from this action as well on appeal.

JURISDICTION

The final order and judgment of the Court of Appeals in *Kaimowitz v. Orlando*, #96-2307, 122 F.3d 41, *supra*, were entered on Sept. 15, 1997, Appendix, at p. 1a, and issued as a mandate, Dec. 19, 1997, after denial of a petition for rehearing and suggestion for rehearing *en banc* on Nov. 20, 1997, *id.*, at 131 F.3d 950, *supra*. On Feb. 13, 1998, Justice Anthony Kennedy entered an order extending the time for filing a petition for writ of certiorari to and including March 17, 1998, *Appendix*, at p. 54a, and on March 17, 1998, further extended the time to April 10, 1998, *id.*, at p. 55a. This petition also is timely filed from the final judgment and dismissal in *Hal Noyes v. Orlando, supra*, on Feb. 6, 1998, and denial or rehearing or reinstatement on appeal, March 2, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

—

The Fifth Amendment to the United States Constitution provides in pertinent part:

No persons shall...be deprived of life, liberty or property without due process of law....

—

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

—

The False Claims Act, 31 United States Code ("U.S.C.") § 3730, as amended in 1986, provides in pertinent part:

(b) Actions by private persons. (1) A person may bring a civil action for a violation of section 3279 for the person and for the United States Government. The action shall be brought in the name of the Government....

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.....

(c) Rights of the parties to qui tam actions....(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action....When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause....

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including an investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination....An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

—

Section 1983 of 42 U.S.C. provides in pertinent part:

Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any such rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Section 1985 and 1985(2) of 42 U.S.C. provide:

Conspiracy to interfere with civil rights....(2) Obstructing justice; intimidating party, witness or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified...or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;....the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one...of the conspirators.

—

Section 144 of 28 U.S.C. provides:

Bias or prejudice of judge. Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 455 of 28 U.S.C. provides in pertinent part:

Disqualification of justice, judge, or magistrate (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

—

Section 1292 of 28 U.S.C. provides in pertinent part:

Interlocutory decisions. (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;....

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Rule 12.2 of the Rules of The Supreme Court provides in pertinent part:

REVIEW ON CERTIORARI; HOW SOUGHT; PARTIES:....2....When two or more cases are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the cases will suffice. A petition for a writ of certiorari shall not be joined with any other pleading.

—

Rule 27 of the Federal Rules of Appellate Procedure ("F.R.App.P.") provides in pertinent part:

Motions: (a) *Content of motions; response.*--Unless another form is elsewhere prescribed by these rules, an application for an order or relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion....

(b) *Determination of motions for procedural orders.* -- Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.

(c) *Power of a single judge to entertain motions.* -- In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief, which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) *Form of Papers; Number of Copies.*--All papers relating to a motion may be typewritten. An original and three copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case.

Rule 26(b) of the F.R.App.P. provides in pertinent part:

(b) *Enlargement of time.* -- The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any action, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal; petition for allowance, or a petition for permission to appeal.....

11th Circuit Rule ("11th Cir. R.") 26-1 also provides:

Motion for Extension of Time. A motion for extension of time made pursuant to FRAP 26(b) shall contain a statement that movant's counsel has consulted opposing counsel and that either opposing counsel has no objection to the relief sought, or will or will not promptly file an objection....

Internal Operating Procedure ("I.O.P.") 1. *Extensions of Time. The court requires the timely filing of all papers within the time period of time allowed by the rules, without granting extensions of time, except upon submission of documentary evidence of extraordinary circumstances (e.g. court dockets or calendars which establish insoluble conflicts, medical evidence of illness). Failure to process an appeal timely may cause it to be dismissed for want of prosecution, under the provisions of 11th Cir. R. 42-1(b)....*

11th Cir. R. 42-1. provides in pertinent part:

(b) Dismissal for Failure to Prosecute. Where appellant fails to file the record or a brief or otherwise fails to comply with rules requiring processing an appeal (or other proceeding) to hearing, the clerk shall issue a notice to counsel, or to appellant if the appearance is pro se, that upon expiration of 14 days from the date thereof the appeal (or other proceeding) will be dismissed for want of prosecution if the default has not been remedied. A party in default must seek leave of the court, by appropriate motion, to file documents out of time or otherwise remedy the default. Failure to seek such relief by filing an appropriate motion shall be considered a continuation of the

default and may result in dismissal by the clerk. The clerk shall not dismiss an appeal (or other proceeding) during the pendency of a timely filed motion to file documents out of time or otherwise remedy the default, but if the court denies such leave the clerk shall dismiss the appeal (or other proceeding) forthwith....

(c) Other. In lieu of the procedures described in (b), the court may take such other or different action as it deems appropriate.

(d) Mandate. A copy of an order dismissing an appeal for want of prosecution shall be issued to the clerk of the district court as the mandate.

11th Cir.Ct.R. 27-1 provides in pertinent part:

Motions. (a) Form of Motion. (1) Motions must be made in writing with proof of service on all parties. Motions should ordinarily be served on other parties by means which are as equally expeditious as those used to file the motion with the court....

(2) A motion shall be accompanied by, and the opposing party shall be served with, supporting documentation required by FRAP 27, including relevant materials from previous judicial or administrative proceedings in the case. A party moving for a stay must include a copy of the judgment or order from which relief is sought and any opinion and findings of the district court.

] (3) In addition to matters required by FRAP 27, a motion shall contain a brief recitation of prior actions of this or any other court or judge to which the motion or a substantially similar or related application for relief has been made.

(4) A motion for extension of time made pursuant to FRAP 26(b) shall, and other motions where appropriate may, contain a statement that movant's counsel has consulted opposing counsel and that either opposing counsel has no objection to the relief sought, or will or will not promptly file an objection....

(6) All motions filed with the court shall include a Certificate of Interested Persons and Corporate Disclosure Statement....except for unopposed motions for procedural orders as described in 11th Cir. R. 27-1(c).

(7) An original and three copies of a motion and supporting papers must be filed if the motion requires panel action. An original and one copy of a motion and supporting papers must be filed if the motion may be acted upon by a single judge or by the clerk....

(c) Motions for Procedural Orders Acted Upon by the Clerk. The clerk is authorized, subject to review by the court, to act for the court on the following unopposed procedural motions:

(1) to extend the time for filing briefs, answers, objections, or replies to pending motions in cases not yet assigned or under submission....

(d) Motions Acted Upon by a Single Judge. Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceedings. Without limiting this authority, a single judge is authorized to act, subject to review by the court, on the following motions:

(1) where opposed, motions that are subject to action by the clerk under part (c) of this rule;...

(7) to extend the times prescribed by the rules of this court for good cause shown (note that FRAP 26(b) forbids the court to enlarge the time for taking various actions, including the time for filing a notice of appeal)....

(e) Motions Shall Not Be Argued. Unless ordered by the court no motion shall be orally argued.

(f) Effect of a Ruling on a Motion. A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the case is assigned on the merits, and the merits panel may alter, amend or vacate it.

Rule 24 of the Federal Rules of Civil Procedure ("F.R.Civ.P.") provides in pertinent part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:...(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application, anyone may be permitted to intervene in an action:...(2) when an applicant's claim or defense and the main action have a question of law or fact in common....In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought....

—

Rule 5 of the F.R.Civ.P. provides in pertinent part:

Service and Filing of Pleadings and Other Papers....

(b) Same. How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with a clerk of the court....Service by mail is complete upon mailing.

Rule 15 of the F.R.Civ.P. provides in pertinent part:

Amended and Supplemental Pleadings

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served....Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires....

Rule 65 of the F.R.Civ.P. provides in pertinent part:

(a) Preliminary Injunction. (1) *Notice*. No preliminary injunction shall be issued without notice to the adverse party. (2) *Consolidation of Hearing With Trial on Merits*. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application....

(b) Temporary Restraining Order; Notice; Hearing; Duration. A(n) order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from the specific facts shown by affidavit, or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing, the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. ....In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character....

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or

suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an office or agency thereof.

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction....shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

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Local Rule 4.06 of the U.S. District Court for the Middle District of Florida provides in pertinent part:

PRELIMINARY INJUNCTIONS. **(a)** A preliminary injunction may not be issued absent notice (Rule 65(a)(1), Fed.R.Civ.P.), which must be given at least five (5) days in advance of the hearing (Rule 6(d), Fed.R.Civ.P.).

(b) All hearings scheduled on applications for a preliminary injunction will be limited in the usual course to argument of counsel unless the Court grants express leave to the contrary in advance of the hearing pursuant to Rule 43(e), Fed.R.Civ.P.. In order to develop a record and the positions of the parties in advance of the hearing, the following procedure shall apply:

(1) The party applying for the preliminary injunction shall fully comply with the procedural requirements of Rule 4.05(b)(1) through (b)(5) of these rules pertaining to temporary restraining orders.

(2) Service of all papers and affidavits upon which the moving party intends to rely must be made at least five (5) full days prior to the hearing (Rule 6(d), Fed.R.Civ.P.).

(3) The party or parties opposing the application must file with the Clerk's Office, and deliver to the moving party, all

counter or opposing affidavits, and a responsive brief, not later than the close of business on the day preceding the hearing (Rule 6(d) Fed.R.Civ.P.).

(4) Lengthy briefs, affidavits and other papers are counterproductive and should be avoided. If the parties desire additional time to prepare, and so stipulate in writing, the scheduled hearing may be postponed....In the event the hearing is postponed, any additional papers must be filed in advance of the rescheduled hearing according to the time periods specified in paragraphs (2) and (3) above (as required by Rule 6(d), Fed. R.Civ.P.)

Local Rule 4.05(b)(1) through (b)(5) of the U.S. District Court for the Middle District of Florida provides in pertinent part:

TEMPORARY RESTRAINING ORDERS....

(b)...(1) The request for the issuance of the temporary restraining order should be made by a separate motion entitled "**Motion for Temporary Restraining Order**."

(2) The motion must be supported by allegations of specific facts shown in the verified complaint or accompanying affidavits, not only that the moving party is threatened with irreparable injury, but that such injury is so imminent that notice and a hearing on the application for preliminary injunction is impracticable if not impossible....

(3) The motion should also: (i) describe precisely the conduct sought to be enjoined; (ii) set forth facts on which the Court can make a reasoned determination as to the amount of security which must be posted pursuant to Rule 65(c), Fed.R.Civ.P.; (iii) be accompanied by a proposed form of... order prepared in strict accordance with the several requirements contained in Rule 65(b) and (d), Fed.R.Civ.P.; and (iv) should contain or be accompanied by a supporting legal memorandum or brief.

(4) The brief or legal memorandum submitted in support of the motion must address the following issues: (i) the

likelihood that the moving party will ultimately prevail on the merits of the claim; (ii) the irreparable nature of the threatened injury...; (iii) the potential harm that might be caused to the opposing parties or others if the order is issued; and (iv) the public interest, if any.

(5)...In addition to the summons, complaint and...order, the papers served must also include all motions, briefs, affidavits and exhibits submitted to the Court, as well as such additional affidavits or other papers upon which the moving party will rely in seeking...a preliminary injunction. The hearing will usually be scheduled within ten (10) days....

Rule 6(d) of the F.R.Civ.P. provides in pertinent part: **Time....(d) For Motions--Affidavits**. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court....When a motion is supported by affidavit, the affidavit shall be served with the motion....

STATEMENT OF THE CASE

Petitioner, an attorney practicing in the federal judicial system in courts in five circuits since 1969, filed a False Claims Act ("FCA") action against Orlando, Fla., its planning director Richard Bernhardt, and an Orlando Neighborhood Improvement Corporation ("ONIC") they created in 1985. The action was filed in Jacksonville on March 25, 1994. He alleged that they knowingly made false claims in applications for grants and privileges to the U.S. Department of Housing and other federal agencies. They were said to have used the federal and related state funding to concentrate blacks, especially the poor among them, in low income housing in a downtown neighborhood ghetto, and to create illusions of non-existent commercial development projects for historically black areas.

Petitioner began to investigate ONIC, its relationship to Orlando, Fla., and banks legally obligated not to discriminate against minority or poor neighborhoods, soon after he arrived in 1985 as appointed executive director of Greater Orlando Area Legal Services, Inc., a federally-funded free legal services program for the eligible poor headquartered in that municipality. Petitioner eventually blew the whistle successfully about discriminatory practices by one lender.[1]

But most of the material was gathered 1988-93 when Petitioner was in private solo practice in Orange County, Fla., primarily during the course of his representation of black groups and members seeking to stop a proposed state highway road extension supported by white City Council members including its former mayor Bill Frederick.[2] Because of their ties to Orlando and its economic support system and/or their antipathy to Petitioner, the three federal judges resident there disqualified themselves in that case[3].

1--*Kaimowitz v. Board of Governors of the Federal Reserve*, 940 F.2d 610 (11th Cir. 1991.) Petitioner as whistle-blower often has been successful for himself or others in challenges to improper public and private institutional policies and practices. See also, e.g., *Kaimowitz v. Mich. Dept. of Mental Health*, 42 U.S.L.W. 2063 (Cir. Ct. Wayne Cty., Mich, 1973)(cited *Parham v. J. R.*, 442 U.S. 594. 626, Brennan, J., dissenting [1978]); *Kaimowitz v. Duke Law Journal*, 315 S.E 2d 82 (N.C.App. 1984); *Kaimowitz v. Bd. of Trustees of the University of Illinois*, 951 F.2d 765 (7th Cir. 1991).

2--*Washington Shores Homeowners Association, et al., v. Orlando, et al.*, 88-962-Civ-Orl-20 (M.D. Fla. 1988), also 602 So.2d 1300 (Fla. 1992).

3--Judge G. Kendall Sharp also disqualified himself in three other cases on motion by Petitioner, Judge Patricia C. Fawsett in two others, because of her former partnership with Tom Cardwell, general counsel for the Florida Bankers Association. However, the recusals stopped as the Eleventh Circuit opined that such recusals alone would not suffice to establish bias against counsel, though they might if based on bias against a party, *Diversified Numismatics v. Orlando*, 949 F.2d 382, 384 and n. 2 (11th Cir. 1991). Judge Anne C. Conway, disqualified herself in *Washington Shores, supra*, in 1993.

So Petitioner objected strongly in the FCA action before Judge W. T. Hodges on Feb. 27, 1995, sitting in Jacksonville granted Defendants a change of venue to the Orlando Division. In Jacksonville, Petitioner on March 6, sought reconsideration and a ruling on judicial disqualification if venue were changed to Orlando. But 10 days before the action was transferred to Orlando, Defendants' counsel with a clerk of the court generated a case number there, so that those motions would be heard in the new venue. On June 15, 1995, U.S. Judge Patricia C. Fawsett denied Petitioner sanctions against Defendant counsel but conceded that there had been irregularities in the transfer process. In March, she had disposed of the attempts to keep the case in Jacksonville.

During the processing of the FCA action in 1994-95 in Jacksonville, Judge Hodges[4] found no reason to meet with parties or counsel, even for the change of venue. In the Orlando Division, Judge Fawsett never found any reason to allow counsel or parties to appear in her court in the FCA action. In a half dozen cases filed by Petitioner and assigned to Judge Fawsett since 1990, she has yet to hold a hearing for any purpose at which he could appear in her court. She denied preliminary relief here on Jan. 29, 1996, a month after such an injunction was sought by Petitioner to prevent him from being arrested pursuant to a local ordinance. He had been taken from a City Council session, handcuffed and placed under arrest on Oct. 31, 1995. Continuing to be concerned about such Orlando interference, Petitioner again sought such restraint by trying to intervene for injunctive and declaratory relief in a § 1983 damage action filed against the City by another plaintiff.

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4. As the district's chief judge, Judge Hodges assigned to himself each of three cases from which the Orlando Division judges had recused themselves, although he eventually assigned other judges for pre-trial and trial proceedings in two. However, Petitioner has never seen Judge Hodges on the bench in any of those cases.

Since the Eleventh Circuit still had not ruled on his appeal from Judge Fawsett's denial of preliminary relief without hearing, Petitioner moved to intervene in the damage action for Hal Noyes, and demand relief for himself and others similarly situated who were subjected to interference with First Amendment rights by Orlando. Noyes alleged he had been falsely arrested and imprisoned for handing out leaflets on Orlando public property. Petitioner had learned about the case and about an apparent pattern and practice of interference with First Amendment rights by Orlando police officers from depositions and news reports. Also, on Feb. 10, 1997, Petitioner again had been escorted from the City Council Chamber and kept outside until the end of the session by four police officers, after his removal was ordered by Mayor Glenda Hood. She had ordered a similar removal and exclusion in 1995. On the second occasion, no arrest was effected. From 1988-93, when Petitioner appeared for the aforementioned African-American groups with frequency, he was removed from the podium and chamber only once, in 1989, but he was allowed to return to the audience without incident.

The *Noyes* civil rights action was assigned to Judge Anne Conway. Petitioner had appeared before her once, in that 1993 case from which she had recused herself. Petitioner had asked her to step down, in part because of financial contributions she had given to Defendant Orlando Mayor Hood. In 1997, when Petitioner tried to intervene in the *Noyes* case, Judge Conway struck his claim, and returned it, and papers for disqualification filed separately. She denied intervention without explanation. The case was closed by May 5, 1997, after Noyes' counsel notified the Court they were voluntarily dismissing the action with prejudice.

The Eleventh Circuit permitted no oral argument in either appeal from the rulings by Judges Fawsett and Conway, or petition for writ of mandamus to reinstate intervention.

On Nov. 26, 1996, Judge Fawsett had granted summary judgment for the Defendants in the FCA action. By March, 1997, that, too, was on appeal. The record on that appeal was docketed on Aug. 13, 1997, at the Eleventh Circuit. Petitioner was notified that his Initial Brief was due 40 days from Sept. 12. On Sept. 15, the Eleventh Circuit affirmed the denial of preliminary relief with published opinion but without oral argument. The decision erroneously stated that the merits had not been resolved as yet below. That error withstood Petitioner's suggestion for rehearing and hearing en banc, although the affirmance was modified on Nov. 20.

On Oct. 7, 1997, Petitioner's appeal from the *Noyes* litigation was docketed. On Oct. 10, Judges Ed Carnes and Lanier Anderson dismissed as moot the petition for writ of mandamus to restore the stricken claim to the record. No one other than the Petitioner and the district court clerk was being notified about any of the Eleventh Circuit *Noyes* actions. Petitioner moved to have the parties below notified of the appeal. On Dec. 2, Judge Joel Dubina denied that motion. On Dec. 5, Petitioner moved for summary reversal and remand for want of an appellee. To Petitioner's knowledge, that motion was not resolved. On Dec. 18, 1997, the Eleventh Circuit notified Petitioner that his Initial Brief and Record Excerpts were due in the *Noyes* appeal 40 days from that date. Petitioner timely moved for an enlargement of time until March 26, 1998, to allow for sufficient time for resolution of his motion for summary reversal and remand. Petitioner had been granted a 30-day extension to file his Initial Brief on the merits in the FCA action. But On Feb. 6, 1998, in the *Noyes* appeal, Judge Carnes denied the motion for enlargement. The Clerk of the Court entered a dismissal as the Eleventh Circuit mandate for the failure to file the Initial Brief and Record Excerpts on time. On Feb. 13, Petitioner filed sufficient copies of those papers with motions to file out of time and for reinstatement. On March 2, Judge Carnes denied the motions.

REASONS FOR GRANTING THE WRIT

I. TO AVOID HEARINGS, THE ELEVENTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN CONFLICT WITH AN APPLICABLE LONG-STANDING DECISION OF THE UNITED STATES SUPREME COURT ABOUT THE REQUISITES OF JUDICIAL PROCEDURAL PROTECTION FOR EXERCISE OF FIRST AMENDMENT RIGHTS.

The Eleventh Circuit clearly erred in its first reported decision when a panel opined that there was no presumption of harm on a First Amendment claim warranting an evidentiary hearing for preliminary relief, or apparently even oral argument. The Eleventh Circuit stated:

> Generally, evidentiary hearings are required prior to the issuance or denial of a motion for preliminary injunction only where there is a presumption of irreparable harm, as in a Title VII employment discrimination case. (*Baker v. Buckeye Cellulose Corp.*, 856 F.2d 167, 169 [11th Cir. 1988] was cited in a note 7.) Because there is no presumption of irreparable harm in this case, the district court did not err in not holding a hearing. AFFIRMED.

Kaimowitz v. Orlando, 122 F.3d 41, 43 (11th Cir. 1997).

In a suggestion for rehearing en banc by Petitioner, he cited Eleventh Circuit precedent, *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983), and lower court decisions requiring a preliminary injunction hearing when claims were made of violations of First Amendment rights. They were relying on a finding in *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547 (1976) that "(t)he loss of First Amendment freedoms even for minimal periods of time, unquestionably constitutes irreparable injury."

Since *Elrod,* such a hearing is expected on First Amendment matters. So the Eleventh Circuit modified its ruling by deleting those two sentences from *Kaimowitz v. Orlando*, 122 F.3d, *supra*, at 43, The Eleventh Circuit added:

> For the reason discussed above, the record conclusively established that Kaimowitz was not entitled in this suit to the unrelated preliminary injunction he sought, and thus it was clear that an evidentiary hearing was not necessary.

Kaimowitz v. Orlando, 131 F.3d 950 (11th Cir. 1997).

Some form of hearing below however would have allowed Petitioner to show how Orlando's interference with his First Amendment rights was intended retaliation against him, precisely because of his filing the FCA action. In violation of 42 U.S.C.§ 1852(2), Orlando audaciously had singled out an adversary in federal court for false arrest. Such interference with a party in a federal court action should have been subjected to immediate hearing, *Kush v. Rutledge*, 460 U.S. 719 (1983). Instead, Judge Fawsett viewed, in camera, over objection, a videotape provided by Orlando ex parte of the Oct. 31, 1995 City Council session. She based a ruling in her denial of preliminary relief order on that viewing. Petitioner contended that relevant facts had to be seen in a broader context. But the trial court disallowed the civil claim as being separate and confusing to the trier of fact in the FCA action.

> Although the Ninth Circuit permits the trial court to exercise discretion to decline to hear testimony even when the facts are controverted (note omitted), most courts hold that when the written evidence reveals a factual dispute, an evidentiary hearing must be provided to any party who requests one.

Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d* § 2949, at p. 228 (1995)(unchanged in 1997 supplement).

Even the Ninth Circuit and other lower courts which may deny oral testimony will permit oral argument, Wright, Miller & Kane, *Federal Practice and Procedure, supra,* § 2949 at n. 44. Oral argument certainly is to be expected on issues of law, *id.*, at pp. 230-231.

Neither the appellate nor the trial court indicated how the record conclusively established that the injunctive relief was not related to the qui tam action, *Kaimowitz v. Orlando*, 122 F.3d, *supra*, at 42. To the extent those judgments imply that no personal action of like nature could ever be brought with a FCA action, it would be contrary to provision of the statute itself, 31 U.S.C. 3730(h), to protect whistle-blowing employees, *U.S. ex rel Rasmeyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1522 (10th Cir. 1996); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 864-65 (7th Cir. 1994); *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951, (5th Cir. 1994), *cert. den.* 115 S.Ct. 1110 (1995); and *Childree v. UAP/GA AG Chem., Inc.*, 92 F.2d 1140, 1144-45 (11th Cir. 1996). Since 1986, the U.S. Congress thus has recognized that retaliation is likely to go with the territory when FCA claims are made.

The Eleventh Circuit by its *Kaimowitz* modification suggests that hearings may depend on how lower courts subjectively assess the merits of FCA or First Amendment claims and their assessment of the parties before they allow hearings for preliminary relief or intervention. Here, after Petitioner was removed in plain view from the audience of a City Council meeting, arrested, handcuffed, and publicly humiliated, as an example to anyone else who dared to accuse Orlando of institutional racism, fraud, or other wrongdoing, the irreparable harm to him and the public should have been obvious. Yet Judge Fawsett waited for a month to decide that the claim was so unrelated to the fraud action that no hearing, no oral argument, was to be allowed. By so ruling, she negated the *Elrod v. Burns* presumption of immediate harm.

On appeal, the Eleventh Circuit did not resolve the preliminary injunction issues including need for some sort of hearing until more than 18 months after the notice of appeal. Then the *Kaimowitz* panel chose to do so by disconnecting them from the appeal already docketed and scheduled for briefing from the judgment on the merits of the FCA action[5]. No oral presentation ever was allowed to the trial judge. The Eleventh Circuit also has shown inclination to limit pre-trial arguments in other cases potentially embarrassing to local authorities. Consolidation was effected in *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996). The *Rozar* panel affirmed summary judgment without hearing. The opinion relied on a hearing held for preliminary relief, in an environmental racism action.

Like the Orlando City Council, the Eleventh Circuit appears willing to adjust procedures to accommodate prevailing public views. For instance, that court did reverse and grant preliminary relief to those acting on beliefs more in keeping with those prevailing in Florida, e.g. abortion clinic protestors charged in state court with trespassing, See, e.g., *Cheffer v. McGregor*, 6 F.3d 705, 710 (11th Cir. 1993), *vacated* 41 F.3d 1421 (11th Cir. 1994), *and remanded* in light of *Madsen v. Women's Health Ctr., Inc.*, -- U.S. --, 114 S.Ct. 2516 (1994). Such underlying substantive issues should not directly affect considerations for some form of hearing immediately when First Amendment issues are raised, unless a claim is frivolous or without basis in fact. Therefore, if *Kaimowitz v. Orlando* published rulings are not reversed, public agencies may be tempted to stifle adversaries now and risk any provable wrongdoing later, out of public view, if they know dissidents will be limited to paper presentation in court.

5--Briefing is underway in the Eleventh Circuit on the merits of the appeal from the grant of summary judgment to all Defendants without evidentiary hearing or oral argument on the fraud claims in the FCA case, *Kaimowitz, qui tam, ex rel United States v. Orlando, FL, et al.*, #97-2777 (11th Cir. 1997).

II. THE ELEVENTH CIRCUIT SANCTIONED A DEPARTURE SO FAR FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY ONE DISTRICT COURT DIVISION, AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION TO ASSURE MEANINGFUL ACCESS TO THE FEDERAL JUDICIAL SYSTEM.

The Eleventh Circuit has permitted judges resident in the Orlando Division in the 1990s to restrict unlawfully the public airing of claims by Petitioner and those he represents about institutional racism and economic deprivation of blacks in their jurisdiction. Judges who recused themselves on his motions from 1988-93 did not disqualify themselves from the FCA action when it was transferred from Jacksonville in 1995, or from Petitioner's attempt to intervene in a damage action to curtail the city's pattern and practice of falsely arresting or interfering with dissidents exercising First Amendment rights on public property. They simply cleared the cases without judicial hearings. The intervention claim was stricken below. A petition for mandamus and a motions were dismissed by orders by one or two judges. The clerk for the Court dismissed the appeal without due process considerations concerning access to justice. Usually intervention, like preliminary relief, in the federal system, requires some form of hearing in the lower court, or the appeals court will reverse and remand, regardless of the merits, as the Eleventh Circuit did for intervenors in a reverse discrimination action dismissed below.

> While we express no views on the merits of their claim, or of the strength of the evidence they sought to introduce, intervenors must be allowed the opportunity to make out their prima facie case.

Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996).

On appeal in *Kaimowitz v. Orlando*, 122 F.3d, *supra*, at 42, the Eleventh Circuit did not mention Petitioner's unlawful arrest and detention, in either of its two published opinions. The Eleventh Circuit insisted review of the FCA first amended complaint was premature, because the merits had not been resolved, despite the fact that Petitioner in a suggestion for rehearing pointed out the Court already had notified the parties to begin briefing the appeal on the FCA claims. Below summary judgment had been entered on them without hearing on Nov. 25, 1996, and reconsideration denied on Feb. 13, 1997. The Eleventh Circuit separately dismissed the petition to restore the *Noyes* intervention claim as moot, presumably because the appeal had caught up with it, and then dismissed the *Noyes* appeal for failure to prosecute, despite every attempt to do so, as soon as notice was given to Petitioner.

The Eleventh Circuit previously has limited access for litigants said to be abusive. They are only entitled to enter the court house to submit papers, *Copeland v. Green*, 949 F.2d 390 (11th Cir. 1991). A judge decides if the papers can be filed. The Circuit has made clear that its lower courts are to be given "considerable" discretion to protect against such litigants, as long as they are not "completely foreclosed from *any* access to the court," *Martin-Trigona v. Shaw*, 986 F.2d 1384, 1387, (11th Cir. 1993). Citing those cases and others developed on point in the Eleventh Circuit, a district judge has stated:

> The Supreme Court has clearly recognized the validity of these judicially ordered curbs on abusive litigation. See *In re McDonald*, 489 U.S. 180, 184, n. 8, 109 S.Ct. 993, 996, n. 8, 103 L.Ed.2d 158 (1989). This circuit has also recognized the power of district courts to strictly control the access which abusive litigants have to judicial resources (cites omitted).

Washington v. Alaimo, 934 F. Supp. 1395, 1399 (S.D. Ga. 1996).

Petitioner concedes he may be regarded as a disfavored litigant. He certainly did not endear himself to the judiciary in his five-year unsuccessful attempt to disassociate himself from the legal association to which he must belong, *Kaimowitz v. The Florida Bar*, 996 F.2d 1151 (11th Cir. 1993)[6]. Judges Fawsett and Sharp recused themselves from that matter.

But Petitioner has had no notice or hearing in these cases or any others from the Orlando Division of the U.S. District Court of Florida to show cause why his appearances should not be limited and filings stricken. Instead, without finding Petitioner legally abusive, Orlando Division judges, later affirmed by the Eleventh Circuit, have refused to allow Petitioner meaningful access to the federal court system to place **in context**, in *Kaimowitz v. Orlando, supra*, (a) actions in Orlando to arrest, handcuff and humiliate him, though he is an attorney with 30 years of federal court experience, and in *Noyes v. Orlando, supra*, (b) that city's pattern and practice of ignoring the First Amendment umbrella protecting dissenters.

In his dissent for four justices *In re McDonald*, 489 U.S. 180, 187-188 (1989), Justice Brennan set forth the following which this Court is asked to consider in this reading:

> I am most concerned...that if, as I fear, we continue on the course we chart today, we will end by closing our doors to a litigant with a meritorious claim. It is rare,

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6--"Supreme Court Chief Justice Gerald Kogan summed it up:...'Lawyers will talk about judges they appear in front of,' Kogan noted. 'Well, trial and appellate judges, we talk about you and we know the ones who are going to come in and try to pull the wool over our eyes and we know the ones we can trust. There is not a single case nor is there a single client that is worth you risking your reputation in the legal community for that client or that case. Once you lose your reputation, you will never get it back,'" G. Blankenship, "Reputations aren't hypothetical, retreat tells lawyers," *The Florida Bar News*, Aug. 1, 1996, p. 1.

but it does happen on occasion that we grant review and even decide in favor of a litigant who previously had presented multiple unsuccessful petitions on the same issue. *Chessman v. Teets*, 354 U.S. 156 (1957); see *id.*, at 173-177 (Douglas, J. dissenting).

This Court annually receives hundreds of petitions, most but not all of them *in forma pauperis*, which raise no colorable legal claim whatever, much less a question worthy of the Court's review. Many come from individuals whose mental or emotional stability appears questionable.[7] It does not take us long to identify these petitions as frivolous and to reject them. A certain expenditure of resources is required, but it is not great in relation to our work as a whole. To rid itself of a small portion of this annoyance, the Court now needlessly departs from its generous tradition and improvidently sets sail on a journey whose landing point is uncertain. We have long boasted that our door is open to all. We can no longer.

In re McDonald, 489 U.S. *supra*, at 187-188.

However, a majority of this Court has been willing to rein in the Eleventh Circuit when a panel there was perceived as going beyond legal and ethical guidelines. This Court declared that such principles must be followed to minimize disparate treatment of similar cases, and thereby help all litigants, *Lonchar v. Thomas*, 116 S.Ct. 1293 (1996).

7--Petitioner has represented several said to be legally disabled in need of hearing on preliminary relief by courts in other places and times. *See, eg., Catalano v. Dept. of Hospitals*, 299 F. Supp. 166 (S.D.N.Y. 1969, three-judge court)(institutionalized chroniically ill persons were heard about their rights to retain Social Security checks); *Bell v. Wayne Co. Gen. Hsptl.*, 384 F. Supp. 1085 (E.D./W.D. Mich. 1974)(Michigan Mental Health Code provisions were declared unconstitutional.)

Such a declaration should be echoed here, to assure a right to be heard, a right to meaningful access to U.S. courts:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights and lies at the foundation of orderly government....Equality of treatment is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907).

> Certainly the right to petition extends to all departments of government. The right of access to the courts is indeed but one aspect of the right of petition.

California Motor Transport Co. v. Trucking Unlimited, 92 S.Ct. 609, 612, 404 U.S. 508 (1972).

CONCLUSION

For the foregoing reasons, certiorari should be granted to review judgments, opinions, and orders of the Eleventh Circuit, and to reverse them to the extent necessary to assure meaningful access at meaningful times to federal court for Petitioners and those similarly situated.

Respectfully submitted,

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APPENDIX

Gabe KAIMOWITZ, Esquire, Qui Tam, Plaintiff-Appellant,

USA ex rel., Plaintiff,

v.

ORLANDO, FL, Rick Bernhardt, Orlando Neighborhood Improvement Corporation ("ONIC"), Defendants-Appellees,
No. 96-2307
Non-Argument Calendar

United States Court of Appeals, Eleventh Circuit.

Sept. 15, 1997.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON and BLACK, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

This is an interlocutory appeal from the district court's denial of a motion for a preliminary injunction. Appellant Kaimowitz brought the underlying action, a *qui tam* claim against the City of Orlando, Florida, *inter alia*, alleging that the defendants knowingly and improperly obtained funds from several federal agencies for the development or improvement of properties in minority-concentrated areas of Orlando, Florida. While the action was pending, Kaimowitz moved for a preliminary injunction, stating that a city ordinance allowed members of the public to speak for five minutes each at the conclusion of city council meetings on any subject, and gave the city counsel and the mayor the authority to enlarge the five-

the city counsel and the mayor the authority to enlarge the five-minute time-limit. He alleged that the mayor and the city council refused to let him speak beyond the five-minute limit and, on one occasion when he did not stop speaking after the time limit, had the police forcibly remove and restrain him until the city council meeting concluded. Kaimowitz asked the district court to grant an injunction denying the mayor's right to enforce the five-minute time limit, stating that the time limit chilled his First Amendment right to free speech. He also asked the district court to declare the ordinance unconstitutional, because the authority to extend the five-minute limit could be used arbitrarily to permit those in agreement with the city leaders to continue speaking while the denial of an extension would silence opposition.

The district court denied the motion for a preliminary injunction, finding that the injunction was not related to the *qui tam* action, and that it would be unnecessarily confusing to allow Kaimowitz to bring a personal action along with an action on behalf of the government. The district court directed Kaimowitz to file his individual claims in a separate action.

On appeal, Kaimowitz raises three issues: (1) the district court erred in denying his motion to amend his complaint; (2 the district court erred in denying his motion for a preliminary injunction because restraint is necessary to keep the defendants from intimidating him; and (3) the district court erred in failing to hold a hearing on his motion for an injunction.

Any review of the district court's denial of Kaimowitz' motion to amend the complaint is premature. This case is before the court as an interlocutory appeal from the district court's order denying Kaimowitz' request for a preliminary injunction. The order is immediately appealable under 28

U.S.C. §1292(a)(1), but the scope of the court's jurisdiction is limited to matters directly related to the denial of injunctive relief.[1] The issues underlying the motion for a preliminary injunction differ from the issues raised in the *qui tam* action; in addition, there is nothing for the court to review because the district court has not ruled on the *qui tam* claim. Consequently, this court lacks jurisdiction under §1292(a)(1) to review the district court's denial of Kaimowitz' motion to amend his complaint.

This Court reviews the district court's denial of a preliminary injunction under an abuse of discretion standard.[2] A preliminary injunction is always appropriate to grant immediate relief of the same character as that which may be granted finally.[3] A district court should not issue an injunction when the injunction in question is not of the same character, and deals with a matter lying wholly outside the issues in the suit.[4] Here the suit is one for damages on a claim of fraud. In his injunction Kaimowitz sought equitable relief regarding a First Amendment issue, but that relief was not of the same character that could be granted finally, and dealt with a matter

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1--See *Callaway v. Block*, 763 F.2d 1283, 1287, n. 6 (11th Cir. 1985) ("As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal").

2--*Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1517 (11th Cir. 1994), cert. denied, 513 U.S. 1146, 115 S.Ct. 1092, 130 L.Ed.2d 1061 (1995); see also *Cafe 207, Inc. v. St. Johns County*, 989 F.2d 1136, 1137 (11th Cir. 1993), noting that preliminary injunction is a "drastic remedy").

3--*De Beers Consol. Mines v. U.S.*, 325 U.S. 212, 220, 65 S.Ct. 1130, 1134, 89 L.Ed. 1566 (1945)(emphasis added).

4--*Id.*

that was wholly outside of the issues in the suit. The district court did not err in denying the motion for an injunction.

As to Kaimowitz' contention that district court was required to hold an evidentiary hearing, the Federal Rules of Civil Procedure state only that "[n]o preliminary injunction shall be issued without notice to the adverse party,"[5] and do not expressly require a hearing on every motion for injunctive relief.[6] Generally, evidentiary hearings are required prior to the issuance or denial of a motion for preliminary injunction only where there is a presumption of irreparable harm, as in a Title VII employment discrimination case.[7] Because there is no presumption of irreparable harm in this case, the district court did not err in not holding a hearing.

AFFIRMED.

THIS PER CURIAM RULING HAS BEEN PUBLISHED: *KAIMOWITZ v. ORLANDO*, 122 F.3d 41 (11th Cir. 1997).

5--Fed.R.Civ.P. 65(a).

6--*See Baker v. Buckeye Cellulose Corp.* 856 F.2d 167, 169 (11th Cir. 1988).

7--*See id.*

UNPUBLISHED
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-2307

FILED
U.S. COURT OF APPEALS

District Court No. 95-204-Civ

SEP 15 1997
MIGUEL J CORTEZ
CLERK

GABE KAIMOWITZ, Esquire, Qui Tam,

Plaintiff-Appellant,

USA, EX REL,,

Plaintiff,

versus

ORLANDO, FLORIDA, RICK BERNHARDT, ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION ("ONIC"),

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

Before ANDERSON and BLACK, Circuit Judges, and CLARK, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court, upon the record and briefs on file, pursuant to Eleventh

Circuit Rule 34-3;
UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be and the same is hereby AFFIRMED,

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered September 15, 1997
For the Court, Miguel J. Cortez, Clerk
By *Matt Davidson*
Deputy Clerk

ISSUED AS MANDATE: 12/19/97

UNPUBLISHED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
96 JAN 30 A 10:36
CLERK,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, Esq.,
Qui Tam,

Plaintiffs,

-vs- CASE NO. 95-204-Civ-ORL-19

ORLANDO, FLORIDA;. RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,

Defendants.

ORDER

This cause before the Court on the following:...

(5) Motion by Qui Tam Plaintiff Pursuant to Rule 12(f), Fed. R. Civ. P. to Strike a Memorandum in Opposition to Qui Tam Plaintiff's Motion for Preliminary and Permanent Injunction Barring Removal from City Council Meeting (Doc. No. 228, filed January 10, 1996), Legal Authority in Support of (1) Motion by Qui Tam Plaintiff Pursuant to Rule 12 (f), Fed. R. Civ. P. to Strike a Memorandum in Opposition to Qui Tam Plaintiff's Motion for Preliminary and Permanent Injunction Barring Removal from City Council Meeting and (2) Motion to Compel by Plaintiff (Doc. No. 230, filed January 10, 1996), Defendant's Memorandum of Law in Opposition to Qui Tam Plaintiff's Motion to Strike Memorandum in Opposition to Motion for Preliminary and Permanent Injunction (Doc. No. 233, filed January 16, 1996), Defendants'

Notice of Filing Videotape of October 30, 1995 City Council Meeting (Doc. No. 234, filed January 16, 1996), Defendants' Notice of Filing Videotape of October 30, 1995 City Council Meeting (Doc. No. 234, filed January 16, 1996), and the videotape of the October 30, 1995 City Council Meeting.

Under Rule 12(f) of the Federal Rules of Civil Procedure, a motion to strike will be granted if a pleading contains any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Friedman v. So. Car. Ins. Co., 855 F. Supp. 348 (M.D. Fla. 1994). Motions to Strike are generally viewed with disfavor and are infrequently granted. Tingley Systems, Inc. v. Bay State HMO Management, Inc., 833 Supp. 882, 884 (M.D. Fla. 1993). The determination of whether a motion to strike should be granted is within this Court's discretion. Quality Inns Int'l Inc. v. Tampa Motel Assoc. Ltd., 157 F.R.D. 528, 531 (M.D. Fla. 1994).

After viewing the videotape of the October 30, 1995 Orlando City Council meeting, this Court finds that the statement of facts set out by the City of Orlando's attorney in the Memorandum in Opposition to qui tam Plaintiff's Motion for Preliminary and Permanent Injunction Barring Removal from City Council Meeting (Doc. No. 227) is not scandalous, impertinent, immaterial, or irrelevant with regard to qui tam Plaintiff's actions or statements made at the meeting. The fact that Defendant Orlando mis-cited one of qui tam Plaintiff's previous cases before this Court does not constitute sufficient reason to strike Orlando's response. Thus, qui tam Plaintiff's Motion to Strike (Doc. No. 228) is DENIED.

(6) Motion with Cited Legal Authorities to File a First Amended Complaint for Equitable Relief as Well as Such Other Recourse as is Permitted by the Federal False Claims Act; and Against Orlando, Fla., Also for Damages and Injunctive Relief Pursuant to 42 U.S.C. § 1983; and for Redress of Wrongs Done in Violation of Federal Freedom of Information Act and Florida Sunshine-in-Government

Provisions (Doc. No. 226) filed January 2, 1996, Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Leave to File First Amended Complaint (Doc. No. 231, filed January 12, 1996), and Amicus Curiae Brief in Limited Opposition to Relator's Motion for Leave to File Amended Complaint (Doc. No. 235, filed January 17, 1996).

....Qui tam Plaintiff also seeks to assert personal claims for alleged civil rights violations under 42 U.S.C. §§ 1983 and wrongful and improper withholding of public information. In this case, since a responsive pleading has already been served, qui tam Plaintiff may amend his Complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Rule 15(a), Fed. R. Civ. P. The decision whether to grant a motion to amend is entrusted to the discretion of the trial court. Barrett v. Ind. Order of Foresters, 625 F.2d 73, 75 (5th Cir. 1980).[8]....

(Q)ui tam Plaintiff seeks to add personal claims of civil rights violations against Orlando under 42 U.S.C. §§ 1983 and 1985 and violations of the Freedom of Information Act and Florida Government in Sunshine Laws. It is not appropriate to join Plaintiff's personal actions against Defendants in the same qui tam action which is brought in the name of the United States. In this qui tam action, the United States is the real party in interest. United States ex rel. Milan, 961 F.2d 46 (sic). To allow qui tam Plaintiff to now sue Defendants in his personal capacity would only confuse and complicate the issues. If qui tam Plaintiff wants to pursue these personal actions, he must do so in a separately filed suit. Accordingly, Plaintiff's Motion to File a First Amended Qui Tam Complaint (Doc. No. 226) is **DENIED**. However, in accordance with Rule 15(d), Federal Rules of Civil Procedure, qui tam Plaintiff may supplement the

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2--Pursuant to Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981),Fifth Circuit decisions before October 1, 1981 bind Eleventh Circuit Courts.

original Complaint with transactions or occurrences or events which have occurred since the date of the original Complaint and which have a bearing on the instant claim.

(7) Motion by Qui Tam Plaintiff For Preliminary and Permanent Injunction to Bar Defendant City from Having Him Removed During City Council Meetings or Subjected to Arrest on the Basis of an Unconstitutional Ordinance (Doc. No. 223, filed December 27, 1995), Memorandum of Law in Support of Motion by Qui Tam Plaintiff for Preliminary and Permanent Injunction (Doc. No. 224, filed December 27, 1995), Affidavit by Qui Tam Plaintiff's Motion for Preliminary and Permanent Injunction Barring Removal form City Council Meeting (Doc. No. 227, filed January 2, 1996).

Plaintiff has filed a Motion for Preliminary Injunction which is not at all related to his Qui Tam Complaint.[9] Therefore, qui tam Plaintiff's Motion/Legal Authority for Court Pursuant to Local Rule 3.01(b) to Permit the Filing of this Restatement of Facts (Doc. No. 236) is **DENIED**.

CONCLUSION

Based on the foregoing,.....Motion by Qui Tam Plaintiff Pursuant to Rule 12(f) to Strike a Memorandum in Opposition to Qui Tam Plaintiff's Motion for Preliminary and Permanent Injunction Barring Removal from City Council Meeting (Doc. No. 228) is **DENIED**; Plaintiff's Motion with Cited Legal Authorities to File a First Amended Qui Tam Complaint (Doc. No. 226) is **DENIED**; Qui tam Plaintiff may supplement the original Complaint with transactions or occurrences or events which have occurred since the date of the original Complaint and which have a bearing on the instant claim; Motion by Qui Tam Plaintiff for Preliminary and Permanent Injunction to Bar Defendant City from Having Him Removed During City

---

3--Plaintiff filed the Motion for Preliminary Injunction before he filed the Motion for Leave to File a First Amended Qui Tam Complaint.

Council Meetings or Subjected to Arrest on the Basis of an unconstitutional Ordinance (Doc. No. 223) is **DENIED**; and Motion/Legal Authority for Court Pursuant to Local Rule 3.01(b) to Permit the Filing of this Restatement of Facts (Doc. No. 236) is **DENIED**.

DONE AND ORDERED at Orlando, Florida, this 29th day of January, 1996.

Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record
Gabe Kaimowitz

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
NOV 20 1997
THOMAS K. KAHN
CLERK

No. 96-2307

GABE KAIMOWITZ, Esquire, Qui Tam,
Plaintiff-Appellant,

USA, ex rel.,
Plaintiff,

versus

ORLANDO, FLORIDA, RICK BERNHARDT, ORLANDO NEIGHBORHOOD IMPROVEMENT CORPORATION ("ONIC"),
Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC
(Opinion_____, 11th Cir. 19, ___F.3d.___).

Before ANDERSON and BLACK, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

No member of this panel nor other judge in regular active service on the Court having requested that the court be polled on Rehearing En Banc (Rule 35, Fed.R.App.P.; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

On panel rehearing, the last two sentences (including footnote 7) of the opinion are hereby deleted, and the following sentence is substituted in lieu thereof:

> For the reason discussed above, the record conclusively established that Kaimowitz was not entitled in this suit to the unrelated preliminary injunction he sought, and thus it was clear that an evidentiary hearing was not necessary.

The petition for panel rehearing is DENIED in all respects except for the foregoing amendment of the opinion.

THIS AMENDMENT HAS BEEN PUBLISHED:
KAIMOWITZ v. ORLANDO, 131 F.3d 950 (11th Cir. 1997).

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
50 Forsyth Street, N.W.
Atlanta, Georgia 30303

August 13, 1997

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case and Names of Parties

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 97-2777 Kaimowitz v. Orlando, FL
DC. DKT NO.: 95-204-CV-ORL-19

The referenced case has been docketed in this court. Please use the appellate docket number noted above when making inquiries....

Counsel participating in this appeal should complete and return the enclosed appearance form within fourteen (14) days. [11th Cir. R. 46-1]. Only counsel who enter an appearance will be noted on the docket. Persons appearing pro se need not file an appearance form.

Sincerely,
Miguel J. Cortez
MIGUEL J. CORTEZ, Clerk

Reply to: Deborah Owens (404) 331-3843

c: District Court Clerk

UNITED STATES CIRCUIT JUDGE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsythe Street, N.W.
Atlanta, Georgia 30303
Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

February 6, 1998

Richard D. Sletten
Clerk, U.S. District Court,
80 N. Hughey Ave., Floor 2, Suite 218
Orlando, FL 32801

Re: 97-2600 Noyes v. City of Orlando
DC DET NO.: 97-00254 CIV-ORL-22

The enclosed certified copy of the Clerk's Entry of Dismissal for failure to prosecute in the above referenced appeal is issued as the mandate of this court.

Please acknowledge receipt by returning the enclosed copy of this letter.

Sincerely,
Thomas K. Kahn
THOMAS K. KAHN, Clerk
Reply To: Ola Solomon (404) 335-6178

THE ENCLOSED ORDER HAS BEEN ENTERED.

UNPUBLISHED

IN THE UNITED STATES COURT OF APPEALS

FILED
U.S. COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT FEB. 6 1998

THOMAS K. KAHN
CLERK

NO. 97-2600

HAL NOYES, Plaintiff-Appellant,

versus

CITY OF ORLANDO, a State of Florida municipality; DANIEL NESSIM, individually,

Defendants-Appellees,

GABE KAIMOWITZ,

Movant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida

ENTRY OF DISMISSAL

Pursuant to 11th Cir. R. 42-1 (b), this appeal is hereby dismissed for want of prosecution because appellant has failed to file an appellant's brief and record excerpts, within the time fixed by the rules, effective this 6th day of February 1998.

THOMAS K. KAHN
Clerk of the United States Court
of Appeals for the Eleventh Circuit

By: Ola Solomon
Deputy Clerk *Ola Solomon*
FOR THE COURT - BY DIRECTION

UNPUBLISHED
IN THE UNITED STATES COURT OF APPEALS

FILED
U.S. COURT OF APPEALS
FEB 6 1998
THOMAS K. KAHN
CLERK

FOR THE ELEVENTH CIRCUIT

NO. 97-2600

HAL NOYES, Plaintiff-Appellant,

versus

CITY OF ORLANDO, a State of Florida municipality; DANIEL NESSIM, individually,

Defendants-Appellees,

GABE KAIMOWITZ,

Movant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ORDER:

Motion for Enlargement of Time to File Appellant's Brief and Record Excerpts to and including March 26, 1998 is ***DENIED.***

Ed Carnes
United States Circuit Court
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FILED *whp*?
97- MAY -2 PM 3:56
CLERK, UNITED STATES
DISTRICT COURT
ORLANDO, FLORIDA

HAL NOYES,
Plaintiff,

v.

CASE NO. 97-254-CIV-ORL-22

CITY OF ORLANDO, a state of
Florida Municipality; and
DANIEL NESSIM, individually,
Defendants.

MR. NOYES' VOLUNTARY NOTICE OF DISMISSAL WITH PREJUDICE

The Plaintiff, HAL NOYES, hereby files this his voluntary notice of dismissal with prejudice of all claims presented by him against the defendants, CITY OF ORLANDO and DANIEL NESSIM, in the above-captioned action. This dismissal is with prejudice and shall include the dismissal of Noyes' claims against the defendants for compensatory damages, punitive damages, costs and attorney's fees. Each party will bear its own costs and attorney's fees incurred in the handling of this legal matter. In filing this notice of dismissal with prejudice, Mr. Noyes reports to the court that the legal dispute between him and the defendants has been resolved.

Dated this *2nd* day of May, 1997.

LAW OFFICES OF
WILLIAM J. SHEAFFER STEVEN G. MASON
609 EAST CENTRAL BOULEVARD
ORLANDO, FLORIDA 32801
TELEPHONE (407) 423-1066 TELEPHONE (407) 649-1063
ATTORNEY FOR PLAINTIFF ATTORNEY FOR PLAINTIFF
By: *William J. Sheaffer* By: *Steven G. Mason*
Florida Bar #0257311 Florida Bar #842508

UNPUBLISHED

FINAL ORDER OF DISMISSAL WITH PREJUDICE

This cause coming before the court upon the above and foregoing voluntary notice of dismissal with prejudice and the court being duly advised in the premises, it is therefore

ORDERED AND ADJUDGED that this cause is dismissed with prejudice. All claims of Hal Noyes against the City of Orlando and Daniel Nessim for compensatory damages, punitive damages, attorneys' fees and costs are hereby dismissed. It is further ordered that each party shall bear its own costs and attorneys' fees incurred in connection with this matter.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 5th day of May, 1997.

Anne C. Conway
Federal Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 6th day of May 1997 to: **STEVEN G. MASON** and **WILLIAM J. SHEAFFER**, Attorneys for the Plaintiff, 609 E. Central Blvd., Orlando, FL 32801; and to **MARK MUNSEY**, City of Orlando, 400 S. Orange Ave., Orlando, FL 32801.

WHPlaines (sp?)

UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

FILED
97- APR 14 PM 2:58
CLERK, UNITED STATES
DISTRICT COURT
ORLANDO, FLORIDA

HAL NOYES,
Plaintiff

CASE NO. 97-254-CIV-ORL-22

v.

CITY OF ORLANDO, a state of
Florida Municipality; and
DANIEL NESSIM, individually,
Defendants.

ORDER

This cause comes before the Court on Gabe Kaimowitz's Motion to Intervene as a Plaintiff and Seek Certification of a Class Action (Dkt. 3) filed March 28, 1997. The Court notes the present Plaintiff objects to the Motion.

Based on the foregoing, it is ordered as follows:

1. The Motion to Intervene as a Plaintiff and Seek Certification of a Class Action (Dkt. 3) is DENIED.

2. The Claim filed by Mr. Kaimowitz (Dkt. 4) is hereby STRICKEN and the Clerk is directed to return the document to Mr. Kaimowitz.

DONE AND ORDERED in Chambers, Orlando, Florida, this 14th day of April, 1997.

Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record
Unrepresented Party, Gabe Kaimowitz

UNPUBLISHED

IN THE UNITED STATES COURT OF APPEALS

FILED
U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT OCT 10 1997
MIGUEL J. CORTEZ
CLERK

NO. 97-2458

IN RE:

GABE KAIMOWITZ

Petitioner,

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida[1]

Before: Anderson and Carnes, Circuit Judges.

BY THE COURT:

Petitioner's application for writ of mandamus is DISMISSED because the petition for writ of mandamus is moot.

1--Petitioner's note. This petition was filed on Apr. 21, 1997, Re: 97-2600 Noyes v. City of Orlando DC DKT NO.: 97-00254 CIV-ORL-22

UNPUBLISHED

IN THE UNITED STATES COURT OF APPEALS

FILED
U.S. COURT OF APPEALS
MAR2 1998
THOMAS K. KAHN
CLERK

FOR THE ELEVENTH CIRCUIT

NO. 97-2600

HAL NOYES,

Plaintiff-Appellant,

versus

CITY OF ORLANDO, a State of Florida municipality; DANIEL NESSIM, individually,

Defendants-Appellees,

GABE KAIMOWITZ,

Movant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

ORDER:

Motion for Rehearing for Appellant (construed as Motion to Reinstate the Appeal) is ***DENIED***.

Motion to File Appellant's Brief and Record Excerpts Out of Time is ***DENIED***.[1]

Ed Carnes
UNITED STATES CIRCUIT JUDGE

1--Petitioner's Note: All seven copies of the Initial Brief and five of the Record Excerpts submitted with the motion filed on Feb. 13 were returned without explanation.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsythe Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Reply Give Number
Of Case And Names of Parties

October 7, 1997

MEMORANDUM TO COUNSEL OR PARTIES:

Re: 97-2600 Noyes v. City of Orlando
DC DET NO.: 97-00254 CIV-ORL-22

The referenced case has been docketed in this court. Please use the appellate docket number noted above when making inquiries....

Counsel participating in this appeal should complete and return the enclosed appearance form within fourteen (14) days. [11th Cir. R. 46-1]. Only counsel who enter an appearance will be noted on the docket. Persons appearing pro se need not file an appearance form.

Sincerely,
Miguel J. Cortez
MIGUEL J. CORTEZ, Clerk

Reply To: Vicki Berrong (404) 331-3833

c: District Court Clerk

UNPUBLISHED

IN THE UNITED STATES COURT OF APPEALS

FILED
U.S. COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT DEC 02 1997
THOMAS K. KAHN
CLERK

NO. 97-2600

HAL NOYES, Plaintiff-Appellant,

versus

CITY OF ORLANDO, a State of Florida municipality; DANIEL NESSIM, individually,

Defendants-Appellees,

GABE KAIMOWITZ,

Movant-Appellant.

On Appeal from the United States
District Court for the Middle District of Florida

O R D E R:

Appellant's "motion for written notification..."[2] is DENIED.

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

1--Petitioner's note: Petitioner sought to have someone notified for the other parties to the controversy below. When this motion was denied, Petitioner on Dec. 5, 1997, sent a Motion for Summary Reversal and Remand to an Unbiased Judge for Consideration of Claims for Injunctive and Declaratory Relief on Behalf of a Class, because no one would be appearing in opposition to his appeal. To Petitioner's knowledge, that Motion was never resolved, although he premised a timely later request for an enlargement of time for the filing of the initial brief and record excerpts for up to 60 days or a reasonable time after that motion was resolved.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
56 Forsythe Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

In Replying Give Number
Of Case And Names of Parties

December 18, 1997

MEMORANDUM TO COUNSEL OR PARTIES:

Re: 97-2600 Noyes v. City of Orlando
DC DET NO.: 97-00254 CIV-ORL-22

Pursuant to Fed.R.App.P. 12(c), be advised that the record is complete for purposes of appeal. APPELLANT'S BRIEF AND RECORD EXCERPTS ARE DUE WITHIN FORTY (40) DAYS FROM THIS DATE. This is the only notice you will receive concerning the due date for filing briefs....

Sincerely,
Thomas K. Kahn
THOMAS K. KAHN, Clerk

Reply To: Ola Solomon (404) 335-6178

Encl.

BR-2 (10/97)

UNPUBLISHED
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

FILED
95 FEB 27 PM
CLERK,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, esq.,
Qui Tam,
Plaintiffs,

-vs- CASE NO. 94-284-Civ-J-10

ORLANDO, Fla., RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,
Defendants.
_____/

ORDER

Defendants City of Orlando and Richard Bernhardt filed a motion for change of venue (Doc. 26) and the remaining Defendant, Orlando Neighborhood Improvement Corporation, filed its own separate motion for change of venue (Doc. 28). Plaintiff responded to both motions (Docs. 29, 30, & 31), and filed a notice of filing (Doc. 34) and an affidavit (Doc. 33) related to the venue issue. Defendants have moved (Docs. 35 & 37) to strike the Plaintiff's notice of filing and affidavit.

Plaintiff's qui tam complaint seeks equitable relief and damages allowed by the False Claims Act. The complaint alleges that the Defendants "have made claims violative of federal law to induce Community Development Bloc Grant ("CDBG") funds and other grants and loans from the U.S.

Department of Housing and Urban Development ("HUD"), and the complaint also seeks "injunctive relief to bar use of such funds for maintenance and expansion of a commercial district, low-income public housing, and alleged rehabilitation of multi-family low-income rental units in virtually all black neighborhoods of Orlando."

Defendants seek a change of venue under 28 U.S.C. § 1404 arguing that Orlando is the better venue because Defendants are located in Orlando and transact the majority of their business there, and because all of the recipients of the allegedly falsely claimed funds are also located in Orlando. Plaintiff opposes a change of venue in this case for three principal reasons. First, Plaintiff contends that all of the documents related to the alleged false claims are located in Jacksonville because the Defendants made all of these claims to the Jacksonville office of the United Stats Department of Housing and Urban Development ("HUD") which processed the claims in and dispersed the funds from Jacksonville. Second, Plaintiff contends that the Judges and jurors residing in Orlando will be biased because this case includes claims against the City of Orlando. Third, Plaintiff argues that in Orlando "an all or assuredly predominantly white jury.. .would resolve to keep the local black population in its place."

Under 31 U.S.C. § 3732, venue in a case under the false claims act is proper:

> in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred.

Under this section, venue is proper in either Jacksonville or Orlando.

Under 28 U.S.C. § 1404, the Court can transfer venue to any other district or division where the action might have been brought if a transfer would serve the convenience of the parties and witnesses and the interests of justice. Ordinarily,

a plaintiff's choice of forum is entitled to considerable weight when a Court (sic) whether to order a change of venue. However, in a false claims act case, a qui tam plaintiff's choice of forum, it is apparent that venue is more appropriate in the Orlando division. All of the Defendants, as well as the officers and employees of the Defendants, reside in Orlando. Moreover, the recipients of the funds acquired through the allegedly false claims, who can be expected to be witnesses in this action, all reside and conduct business in Orlando. Although some documentary evidence is located in Jacksonville's HUD office, all of the Defendants' documents and all of the documents of the recipients of the HUD funds are located in Orlando. Finally, Plaintiff is a Gainesville resident, and therefore, will not be significantly inconvenienced if forced to litigate this matter in Orlando rather than Jacksonville. For all of these reasons, the Court finds that a transfer to the Orlando division would serve the convenience of the parties and witnesses and the interest of justice.

Accordingly, upon due consideration:

(1) The Defendants' motion to transfer venue (Docs. 26 & 28) are GRANTED and the clerk is directed to transfer this case to the Orlando division; and

(2) Defendants' motions to strike (Docs. 35 & 37) are DENIED.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida this *27th* day of February, 1995.

W Terrell Hodges

UNITED STATES DISTRICT JUDGE

Copy to counsel of record

UNPUBLISHED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
95 MAR 16
CLERK,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, esq.,
Qui Tam,

Plaintiffs,

-vs-

CASE NO. 95-204-Civ-ORL-19

ORLANDO, Fla., RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION, ("ONIC")

Defendants.

ORDER

This case comes before the Court upon Plaintiff UNITED STATES OF AMERICA, ex rel GABE KAIMOWITZ'S Motion for Recusal of Judges and Senior Magistrate in Orlando Should Venue Change be Ordered (Doc. No. 51, filed March 6, 1995).

BACKGROUND

On March 25, 1994, Plaintiff filed a Qui Tam action arising under the False Claims Act, 31 U.S.C.§ 3729-3733. Plaintiff alleges that the City of Orlando, its planning and development director, and the Orlando Neighborhood Improvement Corporation have made false claims in order to procure Community Bloc Grant Development (sic) funds and other grants and loans from the U.S. Department of Housing and Urban Development ("HUD").

The instant action was originally filed in the Jacksonville Division of the U.S. District Court, Middle District of Florida. It was transferred to the Orlando Division on February 27, 1995, and was assigned to the undersigned judge. Plaintiff now seeks recusal of all the Orlando judges pursuant to 28 U.S.C. § 144.

CONCLUSIONS OF LAW

Section 144 of 28 U.S.C. states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

In the instant case, Plaintiff has filed a fifteen page affidavit accompanied by numerous exhibits. The affidavit presents the facts upon which Plaintiff bases his belief that all of the judges in the Orlando Division are biased against him and against racial minorities; however, the Court will deal only with those facts that relate to the undersigned judge.

Plaintiff's complaints against the undersigned are presented on pages 7-9 of his affidavit. Although the affidavit is less than a model of clarity, Plaintiff appears to base his

belief that the undersigned judge is biased against him primarily on her rulings in previous cases. Plaintiff objects to the undersigned's refusal to recuse herself in three previous cases, Macon v. City of Orlando, 89-327-CIV-ORL-19; Harmon v. Orlando, 89-424-CIV-ORL-19; and Webster v. Frank, 90-624-CIV-ORL-19. The undersigned did not try any of those cases. Macon and Harmon were assigned to visiting judges and Webster settled. However, the undersigned did grant a post-trial motion for sanctions in the amount of $568 against Plaintiff in the Harmon case. Plaintiff also points to the fact that the undersigned awarded costs against Plaintiff in Walker v. Frito-Lay, Inc., 89-522-CIV-ORL-19 as evidence of bias.

The Court finds that Plaintiff's affidavit is legally insufficient to support a motion for recusal based on the undersigned's previous rulings. To be legally sufficient under §. 144, a motion for recusal "must allege personal bias or prejudice caused by an extrajudicial source other than what the judge has learned or experienced from his participation in the case." Sine v. Local No. 992 Int'l Brotherhood of Teamsters, 882 F.2d 913, 915 (4th Cir. 1989). The Courts have repeatedly held that a motion for recusal may not normally be based on a judge's ruling in the same or another case. Liteky v. United States, 114 S.Ct. 1147, 1157 (1994)(Judicial rulings alone almost never constitute valid basis for a bias motion); United States v. MMR Corp., 954 F.2d 1040 (5th Cir. 1992)(Adverse rulings in a case are not adequate basis for demanding recusal); McWhorter v. City of Birmingham, 904 F.2d 674 (11th Cir. 1990)(Ordinarily, judge's ruling in same or related case may not serve as a basis for recusal). Therefore, Plaintiff's allegations relating to the undersigned rulings in prior cases are legally insufficient to support a claim under § 144.

In addition to complaints about the undersigned's rulings in prior cases, Plaintiff alleges that the undersigned is racially biased. Plaintiff made virtually the same allegations

in a motion to disqualify the undersigned in the Webster case. In its opinion denying Plaintiff's motion, the Court stated:

> Plaintiff's allegations that this Judge is biased against blakcs (sic) as a group are speculative and inconclusive. The allegations are based on statements of others which imply discriminatory practices on the part of the OrangCounty Bar Association, the Florida Bar, and judges on the federal bench.' Although this judge has been associated with each of these groups or organizations, the allegations do not specify any discriminatory conduct on her part. Disqualification is not warranted by rumors or opinions, nor by speculative assertions that require a series of inferential leaps in order to arrive at a conclusion that a judge is biased. See United States v. Haldeman, 559 F.2d 31, 134 (sic) (D.C. Cir. 1976).
>
> Since Plaintiff has still not specified any discriminatory conduct on the undersigned's part, but has simply recycled stale speculation, the Court finds that Plaintiff's allegations are not legally sufficient to support a motion for recusal under § 144. Accordingly, Plaintiff's Motion for Recusal (Doc. No. 51) is DENIED.

DONE AND ORDERED at Orlando, Florida, this *15th* day of March 1995.

Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

COPIES MAILED
ON 3-15 1995
By DJD
Deputy Clerk

UNPUBLISHED
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
95 MAR 17 AM 11:01
CLERK,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, esq.,
Qui Tam,

Plaintiffs,

-vs- CASE NO. 95-204-Civ-ORL-19

ORLANDO, Fla., RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION, ("ONIC")

Defendants

ORDER

This case comes before the Court upon the following matters: (1) Plaintiff UNITED STATES OF AMERICA, ex rel GABE KAIMOWITZ' Motion for Reconsideration of an Order of February 27, 1995, Granting Change of Venue (Doc. No. 50, filed March 6, 1995)....

(4) Plaintiff's Motion for Preliminary Injunction (Doc. No. 57, filed March 13, 1995); Defendants' Memorandum of Law in Opposition to Qui Tam Plaintiff's Motion for Preliminary Injunction (Doc. No. 70, filed March 16, 1995).

I. Motion for Reconsideration of Change of Venue

The instant action was originally filed in the Jacksonville Division of the U.S. District Court, Middle District of Florida. Defendants sought a change of venue pursuant to 29 U.S.C. § 1404 arguing that Orlando was the better venue because Defendants are located in Orlando and transact the majority of their business there and because all of

the recipients of the allegedly falsely acquired government funds are also located there. Plaintiff objected to the change of venue on the grounds that all of the documents related to the allegedly falsely acquired funds are located in Jacksonville, that the judges and jurors living in Orlando would be biased because the action is against the city, and that "an all or assuredly predominantly white jury would resolve...to keep the local black population in its place."

The district court in Jacksonville considered Plaintiff's arguments but nevertheless determined that Orlando was the appropriate venue.[3] After reviewing the original pleadings submitted by both parties as well as the pleadings and materials submitted by Plaintiff in his motion for reconsideration, this Court finds that Orlando is the better venue for the instant action.

Accordingly, Plaintiff's Motion for Reconsideration of an Order of February 27, 1995, Granting Change of Venue (Doc. No. 50) is **DENIED**....

IV. Motion for Preliminary Injunction

Plaintiff seeks to enjoin Defendants from filing any papers with the Orlando Court until rulings have been entered on Plaintiff's Motions for Reconsideration of the Transfer of Venue and for Recusal of the Orlando judges. The Court has denied both those motions.

Accordingly, Plaintiff's Motion for Preliminary Injunction (Doc. No. 57) is DENIED AS MOOT.

DONE AND ORDERED at Orlando, Florida, this 16th day March, 1995. *Patricia C. Fawsett*

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

1--Although the Order transferring this case to Orlando was entered by Judge Terrell Hodges of the Jacksonville Division, since the case has been assigned to the undersigned judge for all purposes, she will rule on the Motion for Reconsideration.

UNPUBLISHED
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FILED
95 JUNE 15 PM 4:06
CLERK,
U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO, FLORIDA

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, esq.,
Qui Tam,

Plaintiffs,

-vs- CASE NO. 95-204-Civ-ORL-19

ORLANDO, Fla., RICK BERNHARDT,
its planning and development director,
and the ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION, ("ONIC")

Defendants

ORDER

This case comes before the Court on the following matters: ....(5) Qui Tam Plaintiff's Motion for Rule 11 Sanctions Against Defendants' counsel (Doc. No. 115, filed April 13, 1995); Defendant ORLANDO, FLORIDA'S Response to Qui Tam Plaintiff's Motion for Sanctions Against Defendants' Counsel {Doc. No. 128, filed April 19, 1995); and Defendant ORLANDO NEIGHOBRHOOD'S Response to Motion for Rule 11 Sanctions Against Defendants' Counsel (Doc. No. 129, filed April 24, 1995).

Qui Tam Plaintiff seeks sanctions against counsel for Defendants for actions Plaintiff alleges that they took to prevent further consideration of any matters in the instant case by the Jacksonville Division of this Court prior to its reassignment to the Orlando Division.

It appears that to the Court that there was some genuine confusion attendant to the instant csae's transfer to the Orlando Division, and that there wsa some delay in filing required papers due to the uncertainty as to when the case was actually transferred. However, the Court finds that any delays were inadvertent and thus sanctions are not appropriate.

Accordingly, Qui Tam Plaintiff's Motion for Rule 11 Sanctions (Doc. No. 115) is DENIED.

DONE AND ORDERED at Orlando, Florida this *15th* day June, 1995.

Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All Counsel of Record.

UNPUBLISHED

UNITED STATES DISTRICT COURT FILED
MIDDLE DISTRICT OF FLORIDA 96 AUG 23 AM 10:36
ORLANDO DIVISION CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,
ex rel. GABE KAIMOWITZ, Esq.,
Qui Tam,

Plaintiff

v. CASE NO. 95-204-CIV-ORL-19

ORLANDO, FLORIDA; RICK
BERNHARDT, its planning
and development director,
and ORLANDO NEIGHBORHOOD
IMPROVEMENT CORPORATION,

Defendants.

ORDER

This cause came before the Court on the following:....

(3) Renewed Motion for Recusal of the Honorable Patricia C. Fawsett in Light of Materials Which Have Surfaced During Discovery (Doc. No. 242, filed February 5, 1996), and Legal Authority in Support of Renewed Motion for Recusal... (Doc. No. 243, filed February 5, 1996). Defendants did not respond.

Qui tam Plaintiff has continually asserted that the undersigned is racially biased and biased against qui tam Plaintiff personally. For the second time in this case qui tam Plaintiff seeks to have the undersigned recuse herself from this action. Title 28 U.S.C. § 144 states:

Whenever a party to any proceeding in a district court

> makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has personal bias or prejudice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reaesons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Qui tam Plaintiff failed to file an affidavit in support of his motion as required by the statute. Further, as stated above, qui tam Plaintiff has already filed a motion for recusal in this case and an affidavit in support thereof, which was denied by this Court as insufficient. (Doc. No. 71). Under the statute, qui tam Plaintiff is not permitted to file another affidavit. Therefore, qui tam Plaintiff's motion for recusal under 28 U.S.C. § 144 is legally insufficient.[1]

Qui tam Plaintiff also argues that the undersigned must be recused under 28 U.S.C. §455(b)(1) and claims the undersigned has knowledge of the following evidentiary facts which allegedly concern the instant proceedings: (a) transactions between Cross Roads Mission and the City; (b) the credibility of her colleague A. Henry Hoche, white property owner in black Parramore; and(c) the interaction

---

1--Petitioner's note: This attorney did not seek relief under this provision because he was aware that he could only file one affidavit for recusal in this action.

between Orlando and the OHA[2] which has its own related history of racial discrimination documented by HUD to 1993. (Doc. No. 243, pg. 7).

Qui tam Plaintiff argues that Henry Hoche, with whom the undersigned served on the OHA Board, and Mavis Starke, who was previously a party to an action before the undersigned, will be witnesses in this case. The fact that the undersigned has had previous interaction with two of the expected witnesses in this case does not mandate the undersigned's recusal. Further, it is questionable what relevance the OHA has to the instant matter. Thus, the Court does not find that qui tam Plaintiff has produced sufficient evidence to require a change in result form qui tam Plaintiff's previous motion for recusal or that recusal is necessary under 28 U.S.C. § 455. Thus, qui tam Plaintiff's Motion for Recusal...(Doc. No. 242) is DENIED....

CONCLUSION

Based on the foregoing...Qui Tam Plaintiff's Renewed Motion for Disqualification....(Doc. No. 241) is DENIED. Qui tam Plaintiff's Motion for Recusal (Doc. No. 242) is DENIED. ....DONE AND ORDERED at Orlando, Florida this 21st day August, 1996.

Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:
All counsel of Record, Gabe Kaimowitz

2--Petitioner's Note: The Orlando Housing Authority. Judge Fawsett served with Mr. Hoche on the OHA five-member board during and immediately before the U.S. Department of Housing and Urban Development ("HUD") Board reported that the public housing agency was discriminating racially by maintaining separate waiting lists for blacks and whites depending on the neighborhood in which the housing was located. Judge Fawsett continued to list her service upon appointment by the Orlando Mayor in her biographical sketch in *Who's Who in America*.

EXCERPTS FROM AN ORLANDO POLICE DEPARTMENT ARREST REPORT SUBMITTED BY PLAINTIFF WITH HIS AFFIDAVIT IN SUPPORT OF PRELIMINARY RELIEF

ORLANDO POLICE DEPARTMENT

Information Report — Case No. 95-334136

Primary Victim: NONE — Dispatch Incident Type: SUSPCS PER

Unit No. : C83

Date/Time Reported: 10/30/95 15:28 Hrs.

Date: Time Occurred: 10/30/95 15:15 Hrs....

Case Narrative

On 10/30/95 at 1400 hours, I, Officer Bradley, was assigned as Sergeant at Arms for the Orlando City Council meeting. Mr. Gabe Kaimowitz was called upon by Mayor Hood to speak on a matter which he filed with the City Clerk. Mr. Kaimowitz told Mayor Hood that he preferred to speak last. Mayor Hood insisted he speak immediately and a short verbal exchange took place between them....

MR. Kaimowitz was placed under arrest at 1518 hours. At 1530 hours, Joe Mittiga came out to the parking lot and informed me that Mayor Hood would prefer that Mr. Kaimowitz not be arrested and taken to jail.

I contacted the Watch Commander, Lieutenant Johnny Redgrave, who responded and authorized the release of Mr. Kaimowitz. This is an information report. No arrest charges have been filed at this time.

JR/7727/103195/0945 hours/n

PRINCIPALS

Informatnl: KAIMOWITZ, GABE, H.Phone: 904-375-2670

No. 1 PO BOX 140119

GAINESVILLE, FL 32614

Race; White Sex: Male D.O.B. 5/05/35 Age: 60

DOCKET ENTRY EXCERPTS FROM THE DISTRICT COURT IN THE QUI TAM ACTION STARTED IN JACKSONVILLE TO INDICATE THAT THE LOWER COURT HAD RULED IN PERTINENT PART ON THE MERITS WHEN THE APPEALS COURT OPINED ON SEPT. 15, 1997, THAT THE LOWER COURT HAD NOT ACTED ON THE QUI TAM CLAIM, AND FURTHER THAT THE ACTION WAS STARTED UNDER A DIFFERENT NUMBER IN THE JACKSONVILLE DIVISION OF THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA. OTHER NOTED ENTRIES ALSO PROVIDE TIME SEQUENCE AND CONTEXT FOR THIS PETITION.

MOTREF APPEAL
DAB

U.S. District Court
Middle District of Florida (Orlando)

CIVIL DOCKET FOR CASE #: 95-CV-204

Kaimowitz et al. v. Orlando, Fla., et al. Filed: 03/25/94
Assigned to Judge Patricia C. Fawsett Nature of Suit: 890
Lead Docket: None
Dkt. # in other court: None

Cause: 32:3729 False Claims Act.

GABE KAIMOWITZ, Esquire,
Qui Tam
plaintiff

Gabe H. Kaimowitz
[COR LD NTC]
Law Office of Gabe Kaimowitz,
P.O. Box 140119
Gainesville, FL 32614
904/334-4718

USA, ex rel

.Karen L. Gable
[COR LD NTC]
U.S. Attorney's Office
Middle District of Florida 201 U.S. Courthouse
80 N. Hughey Ave.
Orlando, FL 32801
USA
407/648-7500

Michael F. Hertz
[COR LD NTC]
Stephen J. Gripkey
[COR LD NTC]
U.S. Dept. of Justice
Civil Division
P.O. Box 261
Ben Franklin Station
Washington, DC 20044
USA
202/307-0497

v.

ORLANDO, FL

Scott A. Glass
{COR LD NTC}

Docket as of August 26, 1997 4:08 pm

I certify the foregoing to be a true and correct copy of the original, RICHARD D. SLETTEN, Clerk
United States District Court
Middle District of Florida
by *R.A.*
Deputy Clerk

Proceedings include all events MOTREF
6:95cv204 Kaimowitz, et al. v. Orlando, Fla. et al.

APPEAL

DAB

3/24/94 1 QUI TAM COMPLAINT for equitable relief as well as damages, costs, etc., allowed by the False Claims Act filed (jef)

3/25/94 -- MAGISTRATE JUDGE CASE ASSIGNMENT to Magis. Judge John E. Steele ....

1/17/95 21 RETURN OF SERVICE executed as to Orlando Neighborhood 1/9/95 Answer due on 1/30/95 for Orlando Neighborhood (mfk)

Docket as of August 26, 1997 4:08 pm Page 4

1/17/95 22 RETURN OF SERVICE executed as to Rick Bernhardt 1/9/95 Answer due on 1/30/95 for Rick Bernhardt (mfk)

1/17/95 23 RETURN OF SERVICE executed as to Orlando, FL 1/9/95 Answer due on 1/30/95 for Orlando, FL (mfk)....

Docket as of August 26, 1997, 4:08 pm Page 5

....

2/22/95 46 MOTION by Gabe Kaimowitz with memorandum in support to resolve two discovery matters requiring immediate attention referred to Magis. Judge John E. Steele (mfk)....

2/27/95 47 ORDER granting [26-1] motion to change venue; granting [28-1] motion to change venue; transferring case to the Orlando Division; denying [35-1] motion to strike [34-1] notice; denying [37-1] to strike [33-1] affidavit (Signed by Judge Wm. T. Hodges) ctc (slc)

2/27/95 -- Intradistrict transfer to Orlando to Division (Their Case No.: 95-204-Civ-ORL-19 (slc)....

3/6/95 50 MOTION by Gabe Kaimowitz for reconsideration of [47-1] order transferring case

to the Orlando Division (mfk) [Entry date 03/08/95]

3/6/95 51 MOTION by Gabe Kaimowitz for recusal of judges and senior magistrate in Orlando should venue be changed as ordered (mfk) [Entry date 03/08/95]....

3/9/95 -- Original file and docket sheet received from Jacksonville Division . (Case No. 94-284-CIV -J-10 (djd) Entry date 03/10/95]

Docket as of August 26, 1997 4:08 p.m. Page 7

3/10/95 -- Motion(s) referred: [51-1] motion for recusal of judges and senior magistrate in Orlando should venue be changed, as ordered referred to Judge Patricia C. Fawsett, [48-1]....

3/10/95 -- Motion(s) no longer referred: [51-1] motion for recusal of judges and senior magistrate in Orlando should venue be changed as ordered....

3/16/95 71 ORDER denying plaintiff's [51-1] motion for recusal of judges and senior magistrate in Orlando should venue be changed as ordered (Signed by Judge Patricia C. Fawsett)....

Docket as of August 26, 1997 4:08 pm Page 9

12/27/95 223 MOTION by qui tam plaintiff Gabe Kaimowitz for preliminary injunction, and for permanent injunction to bar defendant City from having him removed during City Council meetings or subjected to arrest on the basis of an unconstitutional ordinance. Appendix attached. (djd) [Entry date 12/28/95]

Docket as of August 26, 1997 4:08 pm Page 26

1/2/96 226 MOTION by qui tam plaintiff Gabe Kaimowitz to file a first amended [1-1] qui tam complaint for equitable relief as well as such other recourse as is permitted by the Federal False Claims Act....

1/4/96 227 MEMORANDUM by defendants Orlando, FL, Rick Bernhardt in opposition to [223-1] motion for preliminary and permanent injunction barring removal from City Council meeting....

1/10/96 228 MOTION by qui tam plaintiff Gabe Kaimowitz to strike [227-1] opposition memorandum to motion for preliminary and permanent injunction barring removal from City Council meeting....

1/16/96 234 NOTICE of filing videotape of October 30, 1995 City Council meeting in support of their memorandum in opposition to motion for preliminary and permanent injunction and motion to strike defendants' memorandum in opposition by defendants Orlando, FL, Rick Bernhardt. Videotape filed separately. [djd]....

1/30/96 238 ORDER...Denying plaintiff's [228-1] motion to strike [227-1] opposition memorandum to motion for preliminary and permanent injunction barring removal from City Council meeting. Denying plaintiff's [226-1] motion to file a first amended [1-1] qui (sic) complaint for equitable recourse as well as such other recourse as is permitted by the Federal False Claims Act....Denying plaintiff's [223-1] motion for preliminary injunction, denying [223-2] motion for permanent injunction to bar defendant City from having him removed during City Council meetings or subjected to arrest on the basis of an unconstitutional ordinance....

(Signed by Judge Patricia C. Fawsett) ctc (djd)....

2/5/96 242 RENEWED MOTION by qui tam plaintiff for recusal of the Hon. Patricia C. Fawsett in light of materials which have surfaced during discovery (djd)....

Docket as of August 26, 1997 4:08 pm Page 29

2/27/96 259 NOTICE OF INTERLOCUTORY APPEAL of [238-1] order by qui tam plaintiff Gabe Kaimowitz....

Docket as of August 26, 1997 4:08 pm Page 31

3/15/96 -- NOTICE assigning 11th Circuit case number 43: [260-1] USCA NUMBER: 96-2307 (djd)

Docket as of August 26, 1997 4:08 pm Page 32

8/23/96 342 ORDER...Denying plaintiff's [242-1] motion for recusal of the Hon. Patricia C. Fawsett in light of materials which have surfaced during discovery....(Signed by Judge Patricia C. Fawsett on 8/21/96 0 ctc (djd)

8/23/96 343 CASE MANAGEMENT AND SCHEDULING ORDER....Jury trial set for 12/2/96 Scheduled for Judge Patricia C. Fawsett (signed by Judge Patricia C. Fawsett) ctc (djd)

Docket as of August 26, 1997 4:08 pm Page 40

10/28/96 -- Transmitted record on appeal to USCA [260-1] appeal (Transmittal includes: 12 Vol. Pleadings;) (rdo)

Docket as of August 26, 1997 4:08 pm Page 43

11/20/96 -- **SET INTERLOCUTORY APPEAL flag. (djd)

11/21/96 -- Record on appeal returned from USCA: (13 Vol. Pleadings, 1 Vol. Exhibits)(rdo)

Docket as of August 26, 1997 4:08 pm Page 48

11/26/96 442 ORDER denying [390-1] motion for a Judge outside the Orlando Division to hear this proceeding; granting [367-1] motion for summary judgment in its favor; and, granting [356-1] motion for summary judgment; based

on this Order, it is unnecessary for this Court to consider qui tam Plaintiff's six Motions for Pretrial Summary Judgment or any other motions pending in this case; the Clerk is ordered to enter judgment in favor of Defendants on all claims and to close this case (Signed by Judge Patricia C. Fawsett 11/25/96) ctc MFR Number 92/04 (gjs).

11/26/96 443 JUDGMENT for Orlando, FL, Rick Bernhardt and Orlando Neighborhood against Gabe Kaimowitz, USA; it is ordered and adjudged that the Qui Tam Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendants, Orlando, FL, Rick Bernhardt and the Orlando Neighborhood Improvement Corporation, recover of the Plaintiff their costs of action; Civil Appeals Checklist Mailed (entered by G. Schafer) MFR Number 92/0460 (gjs)

11/26/96 -- CASE CLOSED. (gjs)

12/6/96 444 MOTION by qui tam plaintiff Gabe Kaimowitz of [443-1] judgment order....

2/14/97 478 ORDER denying [444-1] motion for reconsideration of [443-1] judgment order....(Signed by Judge Patricia C. Fawsett) (rdo) Entry date 02/18/97

3/13/97 493 NOTICE OF APPEAL of [478-1] order by Gabe Kaimowitz.....

DOCKET ENTRY EXCERPTS FROM THE DISTRICT COURT IN THE ACTION BY PETITIONER TO INTERVENE IN NOYES v. CITY OF ORLANDO, ET AL., TO SHOW ESPECIALLY LACK OF PARTICIPATION BY DEFENDANTS AND STRIKING OF DOCUMENTS

APPEAL JGG

U.S. District Court
Middle District of Florida (Orlando)

CIVIL DOCKET FOR CASE #: 97-CV-254

Kaimowitz et al. v. Orlando, Fla., et al. Filed: 03/17/97
Assigned to Judge Patricia C. Fawsett Jury Demand: Plaintiff
Lead Docket: None Jurisdiction: Federal Question
Dkt. # in other court: None
Cause: 42:1983 Civil Rights Act

HAL NOYES,
plaintiff

William J. Sheaffer
[COR LD NTC]
William J. Sheaffer, P.A.
609 E. Central Blvd.
Orlando, FL 32801
USA
407/423-1066
Steven Gerald Mason
[COR LD NTC]
Law Office of Steven Mason
609 E. Central Blvd.
Orlando, FL 32801
407/649-1063

v.

CITY OF ORLANDO, a State of Florida municipality,
defendant

DANIEL NESSIM, individually,
defendant

GABE KAIMOWITZ
movant

Gabe Kaimowitz
[COR LD NTC] [PRO SE]
Law Office of Gabe Kaimowitz
P.O. Box 140119
Gainesville, FL 32614
(904) 334-4718

I certify the foregoing to be a true and correct copy of the original.
RICHARD D. SLETTEN, Clerk United States District Court,
Middle District of Florida Docket as of October 10, 1997 3:33 pm
By: *R.CL*
Deputy Clerk

Proceedings include all events

6:97CV254 Noyes v. City of Orlando, et al APPEAL

JGG *Beg Vol 1*

3/17/97	1	COMPLAINT filed. Action alleging violation of civil rights. (Jury Demand) (nbl).
3/17/97	--	FILING FEE PAID. Filing Fee $ 150.00 Receipt #64699 (nbl)
3/17/97	--	MAGISTRATE JUDGE CASE ASSIGNMENT. Magistrate assigned: James G. Glazebrook (nbl)
3/17/97	2	CERTIFICATE OF COMPLIANCE by Hal Noyes with Local Rule 1.04(c). No related cases. (nbl)
3/17/97	--	SUMMON(ES) issued for City Orlando, Daniel Nessim. Consent(s) issued. (nbl)
3/28/97	3	MOTION to intervene as a plaintiff by Gabe Kaimowitz re: [3-1] and seek certification of a class action. (maa)
3/28/97	3	...and REQUEST for oral argument by Gabe Kaimowitz re: [3-1] motion to intervene as a plaintiff by Gabe Kaimowitz [3-2]....

3/28/97	4	CLAIM of party seeking to intervene as a plaintiff and pursue certification of class action by Gabe Kaimowitz (in support of [3-1] motion to intervene as a plaintiff by Gabe Kaimowitz, [3-2] motion seek certification of a class action]. (STRICKEN BY ORDER #9) (maa) (Edit date 04/15/97])
3/31/97	5	RETURN OF SERVICE executed as to Daniel Nessim 3/18/97. Answer due on 4/7/97 for Daniel Nessim. (nrs)
3/31/97	6	RETURN OF SERVICE executed as to City of Orlando 3/17/97. Answer due on 4/7/97 for City of Orlando (nrs).
4/3/97	7	NOTICE of designation under Local Rule 3.05-TRACK 2 (ctc) (nrs) [Entry date 04/04/97]
4/10/97	8	RESPONSE by Hal Noyes to [3-1] motion to intervene as a plaintiff by Gabe Kaimowitz, [3-2] motion seek certification of a class action. (nrs) [Entry date 04/11/97]
4/14/97	9	ORDER denying [3-1] oral argument requested; [3-1] motion to intervene as a plaintiff by Gabe Kaimowitz; [3-2] motion seek certification of a class action; striking [4-1] support memo.... (Signed by Judge Anne C. Conway.) ctc (nrs) [Entry date 04/15/97]
4/17/97	10	MOTION by Gabe Kaimowitz for disqualification of attorney William J. Sheaffer. STRICKEN by Order #13....

4/17/97	11	MOTION by Gabe Kaimowitz for disqualification of Jude Anne Conway (STRICKEN BY ORDER #13) (nrs) [Entry date 04/18/97] {Edit date 04/21/97]
4/17/97	12	MEMORANDUM by Gabe Kaimowitz in support of [11-1] motion for disqualification of Judge Anne Conway [10-1] motion for disqualification of attorney William J. Sheaffer. (STRICKEN [Edit date 04/21/97]
4/21/97	13	ORDER striking [12-1] support memorandum, [11-1] motion for disqualification of Judge Anne Conway and [10-1] motion for disqualification of attorney William J.Sheaffer. The Clerk shall return the documents to Mr. Kaimowitz . (Signed by Judge Anne C. Conway.) ctc (nrs)
5/2/97	14	NOTICE of voluntary dismissal with prejudice by Hal Noyes. (maa)
5/6/97	--	ENDORSED ORDER grantng [14-1] dismissal with prejudice. (Signed by Judge Anne C Conway) ctc (maa)
5/6/97	--	CASE CLOSED. (maa)
5/6/97	15	NOTICE OF APPEAL of [0-0] endorsed order by Gabe Kaimowitz Appeal Information Sheet Sent to Appellant. Fee Status: pd. *End Vol. 1* (red) [Entry date 05/07/97
6/2/97	--	NOTICE assigning 11th Circuit case number re: [15-1] appeal. USCA NUMBER: 97-2600 (rdo)

UNPUBLISHED--IN RECORD EXCERPTS BELOW
UNITED STATES DISTRICT COURT

FILED
93 SEP 27 AM 11:46
CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GREATER WASHINGTON SHORES HOMEOWNERS ASSOCIATION, et al.,

Plaintiffs.

vs. CASE NO. 88-962-CIV-ORL-22

CITY OF ORLANDO,

Defendants.

_____/

ORDER

As a result of Plaintiffs' counsel's comments and the position asserted by him at the hearing before this Court on September 27, 1993, I have determined that my impartiality toward Plaintiffs' counsel might reasonably be questioned if I were to continue presiding over this case. Accordingly, I hereby recuse myself pursuant to 28 U.S.C. § 455.

DONE AND ORDERED in Chambers in Orlando, Florida, this 27th day of September, 1993.

Anne C. Conway
ANNE C. CONWAY
United States District Judge

Copies to: Counsel of Record
Magistrate Judge Donald P. Dietrich

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

William K. Suter AREA CODE 202
Clerk of the Court 479-3011

March 25, 1998

Johnie A. McLeod
McLeod, McLeod & McLeod
P.O.Box (950), 48 E. Main Street
Apopka, FL 32704

RE: Gabe Kaimowitz v. Orlando, Florida

Dear Mr. McLeod:

The motion "for consolidation of actions in petition for certiorari" received March 24, 1998 is herewith returned. Pursuant to Rule 12.4 of the Rules of this Court, a single petition for a writ of certiorari covering all judgments may be filed when the judgments sought to be reviewed are from the same court and involve identical or closely related questions.

Sincerely,
William K. Suter, Clerk
By: *Christopher W. Vasil*
Christopher W. Vasil
(202) 479-3027

Enclosures
cc: Jeffrey G. Slater
Bill Goodman
Paul Donnelly

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543
February 13, 1998

Re: Gabe Kaimowitz
v. Orlando, Florida, et al.,
Application No. A-590

Dear Mr. Kaimowitz:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on Feb. 13, 1998, extended the time to and including March 17, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By *Gail B. Johnson*
Gail B. Johnson
Assistant Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543
March 10, 1998

Re: Gabe Kaimowitz
v. Orlando, Florida, et al.,
Application No. A-590

Dear Mr. Kaimowitz:

The application for a further extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on March 10, 1998, extended the time to and including April 10, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By *Gail B. Johnson*
Gail B. Johnson
Assistant Clerk